Nos. 80-5049 and 80-54

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

CLIFFORD E. CLAYTON,

*Petitioner,*

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AND ITS LOCAL 509,

*Respondents.*

ITT GILFILLAN, ETC.,

*Petitioner,*

v.

CLIFFORD E. CLAYTON,

*Respondent.*

**On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF FOR PETITIONER CLAYTON

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the UAW internal appeal, assuming it could afford Petitioner any relief at all, is adequate to enforce Petitioner's contractual rights arising out of his allegedly wrongful discharge by ITT and the alleged breach by UAW of its duty fairly to represent him.

2. Whether the UAW internal appeal, assuming it could afford Petitioner any relief at all, is adequate in light of its inability to afford relief within the period prescribed by 29 USC §411(a)(4).

3. Whether the UAW internal appeal is inadequate because its tribunals lack jurisdiction over the subject matter and an essential party, because they can produce no result helpful to the trial court and because recourse to them would impose duplicative litigation burdens on Petitioner.

4. Whether the UAW internal appeal is inadequate by reason of its incompetence to afford any relief at all to Petitioner.

5. Whether the Court of Appeals erred in holding that the exhaustion of the UAW internal appeal was a mandatory precondition to Petitioner's resort to the courts in order to "forestall unnecessary interference with union affairs."

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## BRIEF FOR PETITIONER CLAYTON

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### OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at 623 F.2d 563 (C.A. 9, 1980). It is reported unofficially at 104 LRRM 2118.

The District Court rendered no written opinion. Its "Findings, Conclusions and Decisions," rendered orally, will be found at RT 300 to RT 303. Its Findings of Fact

and Conclusions of Law are at R 397 to R 404. The Judgment is at R 408 to R 409 (A 114).

## STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

Jurisdiction to review the Judgment of the Court of Appeals by writ of certiorari is conferred by 28 U.S.C. Section 1254(1). The Judgment and Order of the Court of Appeals was entered April 14, 1980. The Petition for Writ of Certiorari on behalf of Petitioner Clayton was docketed in this Court on July 11, 1980.

Jurisdiction of the trial court is predicated upon 29 USC Section 185(a) and (c). Its judgment was entered May 31, 1977, and Notice of Appeal was filed June 27, 1977.

The appellate jurisdiction of the Court of Appeals was invoked under 28 USC Section 1294.

## STATUTES AND REGULATIONS INVOLVED

Labor Management Relations Act of 1947, as amended, Section 301; 29 U.S.C. Section 185(a) and (c):

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

* * *

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Labor Management Reporting and Disclosure Act of 1959, as amended, Section 101(a)(4); 29 U.S.C. Section 411(a)(4):

(e) No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further*, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

## STATEMENT OF THE CASE

Petitioner[1] was discharged by ITT February 14, 1975. He initiated this action February 5, 1976 against ITT under §301 of the Labor Management Relations Act of 1947, as amended, 29 USC §185, alleging the discharge to have been a breach of the collective agreement covering him (First Amended Complaint, R 33 to R 36; A 3 to A 5) and against UAW, alleging breach by UAW of its duty fairly to represent him by failing and refusing to take to arbitration his discharge grievance. (R 36 to R 39; A 5 to A 9.)

Both ITT (R 130/21-25; A 12) and UAW (R 137/32 to R 138/3; A 18) asserted as affirmative defenses Petitioner's failure to exhaust his internal union remedies. Petitioner contended that those remedies were inadequate as a matter of law and that the trial court should in its discretion not require his resort to or exhaustion of those remedies as a pre-condition to maintaining his action. Pursuant to Federal Rules of Civil Procedure, Rule 42(b), the trial judge ordered a separate trial on the issue of exhaustion as an issue potentially dispositive of the entire action. (R 141/24-26; A 21). After trial on that issue alone, the trial court determined that the internal remedies of the UAW, and in particular the appeal to its Public Review Board (hereafter "PRB"),

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[1] All references to Petitioner in this brief are to Petitioner Clayton. All other parties will be referred to by their respective names.

were adequate to review and redress Petitioner's grievance and to grant a range of possible relief appropriate to his case. (R 401/9-12.) The Court found that Petitioner had failed to exhaust these remedies and dismissed his action against both ITT and UAW. (R 339/1-19; R 408 to 409; A 114.) Its judgment was entered May 31, 1977. (R 408; A 114.)

Petitioner on June 27, 1977, timely filed his notice of appeal to the Court of Appeals for the Ninth Circuit. (R 411; A 116.) By its judgment of April 14, 1980, that Court affirmed the District Court's dismissal of the claim against UAW and reversed the dismissal of the claim against ITT. The case was remanded for trial against ITT only on the issues of UAW's breach of its duty of fair representation and ITT's breach of its collective agreement. (A 117.)

Petitioner had been employed by ITT for over eight years (RT 140/3)[2] and, since 1967, under a collective agreement between UAW and ITT (Joint Exhibit A, R 54/5-15; A 29 et seq.) which was in force at the time of his discharge. (R 398/6-11; A 29.) He timely filed a grievance in accordance with the provisions of that agreement. (R 398/18-20.) The grievance was duly processed through the three steps of the Grievance Procedure and a timely request for arbitration was made. (R 398/21-24) Thereafter, the International Representative servicing Local 509, and acting in its name,

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[2] References in the form "RT" are to the reporter's transcript.

withdrew the request. (Joint Ex. C; A 78 to A 79; RT 88/21 to RT 89/16; R 398/25-28.) The withdrawal of the request for arbitration effectively terminated Petitioner's grievance and finally closed to him the remedies available to him under the collective agreement. (RT 108/15 to RT 109/7.) He took no steps to invoke the appeals procedure of UAW in relation to the latter's action. (RT 32/17-25; R 399/7-19.)

That procedure is prescribed in the UAW constitution (Joint Exhibit B).[3] Since petitioner's local union was an "amalgamated local" consisting of "units" each comprising a given employer's shop or premises (RT 60/9 to 61/1), the first step of appeal was to the local union (Joint Ex.B, Art. 3; A 70.) That appeal had to be brought within thirty days of the conduct complained of. (Joint Ex.B, Art. 33, §2; A 70.) Failure of the local union to act within forty-five days permits appeal to the International Executive Board (hereafter, "IEB") (Joint Ex.B, Art. 33, §5; A 70 to A 71), and that appeal must be filed with the International President within thirty days. (Joint Ex.B, Art. 33 §6; A 71.) The President is required to secure from the lower tribunal the documents in the case. (Joint Ex.B, Art. 33, §6; A 71.) There appears to be no time constraint within which the President must obtain those documents and submit the matter to the IEB. The appeal is heard by a committee of two members of the IEB which submits its recom-

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[3] Relevant portions of the constitution are excerpted in the Joint Appendix. (A 62 to A 77).

mendation to a nine member committee for final decision. (Joint Ex.B, Art. 33, §7(a); A 71 to A 72.) The IEB is enjoined to "use its best efforts" to decide the appeal within 60 days of its receipt by the President. (Joint Ex.B, Art. 33, §7(c); A 73.) In cases deemed "appropriate" by him the President "may decide an appeal" without reference to the committees of the IEB. (Joint Ex.B, Art. 33, §7(b); A 73.) There appear to be no time limits imposed for such decision. Following decision by the IEB or the President, the case may be appealed either to the Constitutional Convention Appeals Committee (CCAC) or the PRB, and either appeal must be taken in 30 days. There is no time prescribed for decision by either of these bodies.

These provisions also require a member to exhaust all appeals before seeking redress from a civil court or governmental agency. (Joint Ex.B, Art. 33, §12; A 76 to A 77.) UAW counsel, however, conceded at the trial that by virtue of the Labor Management Reporting and Disclosure Act of 1959 (29 U.S.C. Section 411(a)(4)), the union's power to require exhaustion is limited to a maximum of four months. (RT 246/2-11.)

The provisions of the UAW Constitution pertaining to the powers of the PRB (Joint Ex.B, Art. 32, A 64 to A 69) are silent concerning the remedies it may order should it find the member's complaint justified. There were received in evidence two decisions of the PRB illustrating its exercise of its powers. Both awarded only backpay; neither dealt with a money award for future loss of earnings. (Joint Ex.F-1; RT 22/8-11; A 89 to A

99; and Joint Ex. F-2; RT 26/8-11; A 100 to A 109.) These decisions were rendered, respectively, four years and two months, and one year and three months after the incidents complained of. It was stipulated at the trial that the PRB had, prior to Petitioner's discharge, awarded as a remedy to certain claimants invoking the procedures of the UAW constitution, back pay for periods prior to the date of the PRB award. (RT 35/12 to RT 36/10.) There is in evidence no decision by the PRB or the CCAC addressing itself to the question of damages for future loss of earnings, whether as a substitute for reinstatement or otherwise. The record contains no policy statement emanating from the PRB, the CCAC, the IEB, or any other officer or body of the UAW, pertaining to the power of the UAW appeals tribunals to award such prospective damages. Other than conferring upon the CCAC "authority to consider and decide all appeals" from the IEB, the UAW constitution is silent on the powers of that body to fashion remedies. (Joint Ex.B, Art 33, §8, A 73 to A 74.)

Under the collective bargaining agreement[4] in effect at the time of Petitioner's discharge, ITT's right to discharge employees covered by the contract was limited to instances of "just cause." (Joint Ex.A, Art. II; A 31.) A determination through the grievance procedure (including arbitration) that an employee was not

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[4] The relevant portions of the collective agreement are excerpted in the Joint Appendix. (A 29 to A 61.) The contract in full is in evidence as Joint Ex. A (RT 54/5-15)

discharged for just cause would result in his reinstatement without loss of seniority. (Joint Ex.A, Art. X, Section 10(b); A 40.)

Seniority is defined as "the length of an employee's continuous service with the Company." (Joint Ex.A, Art. X; A 36). Seniority applies to promotions (Joint Ex.A, Art. X §4 A 37), layoffs and recall rights (Joint Ex.A, Art. X, §5; A 38), the right to replace a less senior employee in a lower paid job in case of layoff (Joint Ex.A, Art. X, §12; A 41 to A 43), shift transfers (Joint Ex.A, Art. X, §8; A 38) bidding for jobs (Joint Ex.A, Art. X, §9; A 39), vacations (Art. XXII §1, A 44 to A 45) and sick pay (Joint Ex.A, Art. XXIII, §1, 2; A 47 to A 48). Benefits under the Pension Plan are directly keyed to length of service. (Joint Ex.A, Art. XXXII and Appendix to the Agreement A 11 to A 15; A 53, A 57 to A 61.) The agreement also provides for automatic wage increases based on length of service and on annual rates negotiated by the UAW. (Appendix to the Agreement A 6 to A 8; A 54 to A 56.)

Other benefits incidental to employment under the collective bargaining contract include Group Insurance and Hospitalization (Joint Ex.A, Art. XXXI; A 52 to 53), paid bereavement pay upon the death of family members (Joint Ex.A, Art. XXVI; A 50), and supplemental jury duty pay (Joint Ex.A, Art. XXVII; A 50 to A 52.)

Petitioner was a shop steward from 1967 to his discharge in 1975. (RT 139/21 to RT 140/3). Shop stewards are elected, and as such they are entitled to seniority over all other employees in their respective areas of representation for purposes of layoff or transfer. (Art. X §7; A 38.)

## SUMMARY OF ARGUMENT

1. This is an action under 29 USC §185 to enforce Petitioner's "contractual rights". Under the collective agreement, had his discharge been without just cause, he would have been entitled to reinstatement with back pay in the exercise of the arbitrator's powers. Such relief is judicially preferred in the exercise of the courts' equitable powers. The UAW appeal can neither effect reinstatement nor restore Petitioner's grievance to the contract grievance procedure where reinstatement and back pay would be available. If the union appeals procedure could award Petitioner money damages, this remedy would be totally inadequate. Petitioner's job was unique and its loss is not adequately compensated for with money. Moreover, quantification of money damages can only be an approximation based upon imprecise and partially unknowable data and must therefore contain a substantial element of conjecture. Use of the court's equitable powers to effect reinstatement with back pay affords a form of flexible relief precisely tailored to the needs of the particular case.

2. §411(a)(4) imposes a four months' duration upon any internal union remedy a member may be required to

invoke as a condition of suing his union. On the face of the UAW constitution, the appeals procedure cannot result in a final determination within that period. Counsel for the PRB has stated that the UAW appeals process, whether the appeal goes to the PRB or the CCAC, is structured to "provide a final adjudication of a claim within a period of approximately nine months to a year."

3. The UAW appeal is inadequate because its tribunals lack jurisdiction over the subject matter and over the employer as a party. To require Petitioner to pursue that appeal would produce no result helpful to the trial court and would impose duplicative litigation burdens upon Petitioner.

(a) The UAW tribunals lack jurisdiction over the subject matter of this action. In the setting of this case, Petitioner's claim of breach of the duty of fair representation is part and parcel of his §301 claim for breach of the collective agreement. As such, these claims are controlled by federal law. The tribunal for their trial and adjudication is the court applying federal law. This responsibility was placed upon the courts by *Textile Workers* v. *Lincoln Mills* in order to develop a uniform federal law to effectuate the national labor policy. The fair representation subject matter of this litigation cannot, consistent with these principles, be adjudicated by a union appeals procedure.

(b) The UAW tribunals lack jurisdiction over the employer as a party to their trial of the fair representa-

tion issue. Since Petitioner must prove that the UAW failed in its duty to represent him fairly as a condition precedent to pursuing his claim against ITT, this issue is an important ground of defense for ITT. The UAW tribunals have no jurisdiction over the employer on this issue. Should they try, and "determine", that question without the employer before them as a party, the issue would not have been fully and fairly litigated and the decision would be a nullity.

(c)Exhaustion of the UAW appeal should not be made mandatory on grounds that such procedure would produce results helpful to the trial court. There is nothing in this record to show that a trial of the issue of fair representation would either sharpen the issues or assist judges faced with unfamiliar union rules and practices. Short of a PRB decision (which would come down long after four months) there is no evidence that the UAW procedure would produce a factual analysis or application of union rules. There is nothing to indicate the nature of the record before the UAW tribunal from which the soundness of any such analysis and application could be tested. Traditional adversary judicial proceedings, including discovery, utilized by experienced counsel can provide all the trial judge would need, including expertise, to decide the fair representation question. Any determination by the UAW tribunals would not be binding on the trial court since it would be deeply implicated with questions of federal labor law. The trial court would thus be required either to litigate the issue *de novo* or decide whether it had been heard and

decided fairly and in conformity with federal law. Either course involves extensive factual inquiry and offers no judicial economy. Both courses place excessive burdens of time and expense upon Petitioner.

4. The UAW appeals procedure cannot award Petitioner money damages. Petitioner seeks and can be awarded damages for breach of fair representation only as part of his remedy for ITT's breach of the collective agreement. He proves breach of the duty of fair representation in order to proceed against his employer for his "contractual rights". If Petitioner is to get damages at all, they will be awarded when he prevails against the employer. Only the court can decide that issue, and when it does, the court will, under *Vaca* v. *Sipes*, fashion the remedy, including any allocation of money damages as between ITT and UAW. In this connection, to refer any part of the remedy question to a union tribunal would disregard the court's responsibilities and create oppressive circuity of action.

5. In employment relation matters such as this, (as differentiated from union-membership questions) the doctrine of exhaustion of internal union remedies should not apply. This principle is also applied to employee rights "in the public domain" because stemming from statutory or constitutional command. The employment relation rights here are also in the public domain. The right to fair representation has been declared by the National Labor Relations Act and the remedy to vindicate it was fashioned in *Humphrey* v. *Moore* and *Vaca* v. *Sipes* specifically to vindicate that public right.

## ARGUMENT

### I

**The UAW Internal Appeal Is Inadequate To Enforce Petitioner's "Contractual Rights". Assuming It Can Afford Petitioner Any Relief At All, It Can Neither Effect His Reinstatement Nor Restore His Grievance To The Arbitration Process.**

Under the collective agreement here, if the discharge were found to have been without "just cause" (Joint Ex.A, Art. II; A 40), Petitioner would have been entitled to reinstatement without loss of seniority.[5]

In *Vaca* v. *Sipes*, 386 U.S. 171, 185, (1967) this Court held that where the employee could show breach of his bargaining agent's duty fairly to represent him concerning his wrongful discharge, he could seek judicial enforcement of his "contractual rights" against the employer. Such enforcement includes "appropriate damages or equitable relief" (386 U.S. at 196), and in context it would seem plain that the two forms of relief are not to be viewed as exclusive alternatives.

A number of Courts of Appeals have declared that, as mandated in *Vaca*, reinstatement is the preferred mode for judicial enforcement of these contractual rights. In *DeArroyo* v. *Sindicato, etc.*, 425 F.2d 281,

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[5] The collective bargaining contract (Ex.A, Art. X, §10; A 31) provides that senority will be broken by discharge only in the case of discharge for just cause.

291 (C.A. 1, 1970), reinstatement was held to be "a perfectly acceptable form of [judicial] relief for §301 suits against the employer" because that "would have been the likely remedy had the grievance been taken through the greivance procedure as it should have been."[6]

*DeArroyo* explicitly followed *Brady* v. *Trans World Airlines*, 401 F.2d 87, 102 (C.A. 3, 1968), where the employee sought *inter alia*, judicial enforcement of his contractual right to reinstatement. That court held that this properly invoked the "equitable powers of the court" and affirmed a lower court order of reinstatement with back pay. (401 F.2d at 102-103.)[7]

The Ninth Circuit in *Margetta* v. *Pam Pam Corp.*, 501 F.2d 179, 181 (C.A. 9, 1974), held that "[t]he fundamental teaching of *Vaca* was that, if the discharge is found to have been wrongful, restoration of the employee to her job is included in the relief she may ob-

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[6] The court there observed that reinstatement would not be warranted where there was a showing that the employee would have been properly discharged at a time prior to judgment, or had obtained equivalent employment eliminating "all prospective injury from the improper discharge" or that "delay" since discharge had made reinstatement "impractical." No such facts are in this record.

[7] *Brady* arose under the Railway Labor Act (45 U.S.C. §151 et seq.) and *DeArroyo*, under the National Labor Relations Act 29 USC §159(a). As the Court in *DeArroyo* observed, the rationale of Brady "applies with equal force under the NLRA" (425 F.2d at 291).

tain." The court held that relief against the union "would not restore her job," and that *Vaca* "indicated" that "adequate relief" may be obtained only by joining the union and the employer."

In *Tatum* v. *Frisco Transportation Co.* 626 F.2d 55, 60 (C.A. 8, 1980), reh. den. 7/30/80, it was held that, to justify exercise of judicial discretion not to order reinstatement, the employer would have to establish "legitimate and substantial business justification showing that reinstatement is inappropriate." In *Butler* v. *Local Union 823*, 514 F.2d 442, 445 (C.A. 8, 1975), *cert. den.*, 423 U.S. 924, judicial discretion to grant the equitable relief of reinstatement was held "more appropriate than an award of damages requiring speculation about future lost earnings." In *Bowen* v. *U.S. Postal Service*, 470 F.Supp. 1127 (W.D. Va. 1979), the court stated its preference for the remedy of reinstatement with full back pay and ordered that if this were not accomplished within 60 days, the employer was to pay the present value of the employee's earnings to the end of his work expectancy apparently without diminution for possible interim earnings.

Upon the authority of *Vaca*, and sound analysis, then, preference for the reinstatement remedy has been rather widely recognized in the vindication of the employee's "contractual rights". This would seem the ineluctable consequence of the principle of restoring to the employee his rights under the collective agreement and thus would point to the direction which the sound judicial discretion spoken of in *Vaca* (386 U.S. at 196)

should take. As is indicated in *DeArroyo*, and *Tatum, supra*, it takes a convincing factual showing of post discharge factors eliminating all prospective injury, or impracticability, or substantial business justification to support the exercise of judicial discretion against a reinstatement award.

There are cases which find in the union remedy a means of judicially enforcing the "contractual rights" of the employee without reinstatement. But these are cases where the internal union tribunals have the power to restore the employee's grievance to the contract grievance procedure. In such circumstances, the effect of the union's breach of its duty to the employee is undone and the employee is once again able to pursue his full remedy under the collective agreement. *Varra* v. *Dillon Companies*, 615 F.2d 1315, (C.A. 10, 1980); *Orphan* v. *Furnco Construction Co.* 466 F.2d 795, 801 (C.A. 7, 1972).

The UAW internal appeals patently fall far short of affording any enforcement of Petitioner's "contractual rights." No agency of the UAW has power to order ITT to reinstate Petitioner with his seniority. When UAW's International Representative withdrew the request for arbitration, Petitioner's remedies under the collective agreement were dead. No agency of the UAW has the power to revive the grievance and restore it to the arbitration process under the collective agreement. Neither ITT nor UAW has contended otherwise in this litiga-

tion. The UAW internal remedy is therefore totally inadequate; it cannot afford Petitioner the core of his contractual rights: reinstatement with back pay or a restoration of the grievance to the arbitral process.

From the evidence the only relief available through the UAW appeal procedure would be an award of money, not restoration to job or revival of the grievance,[8] and the court below so assumed (623 F.2d at 566.) In the case of a discharged employee, such an award would have to apply to two periods of time: *first*, the period from the date of discharge to the date of the award; and *second*, the period from the date of the award to the end of the employee's work expectancy. The UAW constitution (Ex.B, Arts. 32 and 33; A 62 to A 77) is silent on the subject of remedies which the various appellate levels may grant. As the evidence (reviewed in *Statement of the Case, ante*, pp. 7-8) shows the only UAW appeals tribunal which has exercised any power to award money has done so only in a back pay situation, i.e., for the period pre-award. There is in evidence no award and no statement of policy that deals at all with loss of earnings for the future, i.e., a period after the award.

But at all events a monetary award would be woefully inadequate to make Petitioner whole for the loss of his job with its over eight years of seniority and

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[8] It is argued below (Point IV) that the UAW tribunal can not award even money damage in this kind of case.

the attendant length-of-service benefits. Any job that has been held for a substantial period of time is unique, and the trial court so conceded.[9] In the case of Petitioner, a black worker with all the disadvantages his race entails in the labor market,[10] this uniqueness has an especially intense quality. Peititioner had been employed by ITT for eight and one-half years. The seniority so built up entitled him to important benefits with respect to layoff, recall from layoff, bidding for jobs, shift transfers, length of vacation, and in many other working conditions, all of which he lost. (See Statement of the Case, *ante*, pp. 9.) Petitioner also lost eight and one-half years of credited service under ITT's Pension Plan. He lost entitlement to wage rates increased by length of service. He also lost the benefit of UAW representation in collective bargaining, which stands as an instrument for both extending his rights and privileges as an employee and defending those already gained. Because so many of these benefits turn upon Petitioner's length of service, they are unique and cannot be replaced with money. They can be provided only by ITT in the setting of its agreeent with UAW.

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[9] "The Court: A job is a job is a job, and there isn't anything like or equivalent to it." (RT 260/23-24).

[10] U.S. Department of Labor Statistics show that the unemployment rate for black males averaged in 1975 nearly twice that of white males and thereafter has averaged considerably more than twice. In the first five months of 1980, the respective average rates were 10.2% and 4.7%. Employment and Earnings, U.S. Dept. of Labor, Vol. 22, No. 7, Vol. 24, No. 1, Vol. 25, No. 1, Vol. 26, No. 1, Vol. 27, No.1, Vol 27, No. 6.

Additionally, it may be assumed that in his period of service Petitioner had developed a familiarity with the duties of his job, the procedures and routines of his employment, and the capacities and peculiarities of his co-workers and superiors, all of which undoubtedly made it possible for him to perform more satisfactorily and thus afforded him some greater assurance of permanence in employment. He had developed associations and friendships with fellow employees. He had achieved a measure of recognition from them by reason of his having been selected and reelected as their shop steward from 1967 to the date of his discharge. All of these intangibles, taken together with the specific rights attendant upon his seniority under the UAW contract, make it clear that the trial court was right in saying that as to Petitioner, "there isn't anything like or equivalent to" his job at ITT. (RT 260/23-24.)

Finally, a money award designed to compensate Petitioner for loss of this unique employment relation would be so speculative as to be extremely difficult to quantify and capable of either depriving the employee of a just award or compelling an employer to make an excess payment.[11] For in these circumstances, the award

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[11] See *Butler* v. *Local Union 823*, 514 F.2d at 455. In *DeArroyo, supra*, the court adverted to the "admittedly difficult problems of quantifying future lost earnings" and observed that this should not "force the parties to accept a more drastic remedy of reinstatement". The context of this observation plainly indicates that the court intended this to mean that where post-judgment

would have to compensate him for not simply his lost earnings down to the time of the award; it would also be necessary to quantify his future losses over the balance of his work expectancy when he could no longer have the job security and other rights which his employment and length of service at ITT had earned for him. Note has already been made of the effect of seniority upon Petitioner's job security in cases of layoff and right to recall when the work force is reconstituted. Similarly, reference has been made to the operation of length of service as a factor in promotion, wage increases, vacation, sick leave, lateral transfers and pensions. To determine Petitioner's loss from the deprivation of those rights and privileges entails comparing his expectable work history spent under the protection of the UAW-ITT agreement with his expectable work history in the employ of some other employer[s]. As to such substitute employment, there is no way of ascertaining whether it would be covered by any collective bargaining contract at all and, if it were, whether the terms of such contract would be different, and in what respects, from those of the contract here, especially with respect to the job security and benefit factors just indicated. One can be sure only that at a different employer, Petitioner's seniority from ITT would be

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developments made reinstatement inappropriate or impractical the problems of quantifying future earning losses should not of themselves compel reinstatement. (425 F.2d 291-292.)

unavailable and he would start at rung one of the seniority ladder.

In making such comparison, for example, one would have to be able to predict with reasonable probability the frequency of Petitioner's foreseeable layoffs, if any, at ITT given his eight and one-half years of seniority, and the likelihood and promptness of Petitioner's recall to employment after each such layoff. Similarly, it would be necessary to predict a like employment history with a new employer and newly accumulated seniority. It is impossible to predict such events at all. They turn on matters over which the parties, and especially Petitioner, have no control; these matters include economic and technological developments and the vicissitudes of the business cycle, as well as the risks of business management, as to which proof is simply not available.[12] In short, the remedy of money damages as it applies to loss of future earnings contains a large element of the conjectural.

In personal injury cases and antitrust cases, (cases "on the law side") these elements are usually resolved

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[12] But it can be said that in the stage of erratic growth in the economy of the United States and the persistence of unemployment (particularly among blacks) since February 1975, when plaintiff was discharged, his seniority of eight and one-half years was of critical, if incalculable, value. See e.g., Economic Report of the President, January 1977, G.P.O. pp. 23-24; U.S. Department of Labor News (Bureau of Labor Statistics), published monthly from the period 1975 to date.

by what, on the data available, is "reasonable" in the mind of the trier of the facts. *See, e.g., Thompson v. Brotherhood of Sleeping Car Porters*, 367 F.2d 489, (C.A. 4, 1966); *Richardson* v. *Communication Workers of America*, 443 F.2d 974 (C.A. 8, 1971); *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 367 (1927); *Story Parchment Co.* v. *Patterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931). The calculations involved in determining what is "reasonable" are of necessity rough and afford at best only an approximation. But in enforcing the "contractual rights" of employees situated as is Petitioner here, the courts under *Vaca* and its progeny exercise equitable powers pertaining to reinstatement and restoration of seniority. (*Vaca* v. *Sipes, supra*, p. 196; *DeArroyo, supra,* pp. 290-292; *Margetta, supra*, p. 181.) Arbitrators of course also exercise such power. The trial court (or the arbitrator) is therefore able to fashion a relief that will precisely (and without conjecture or surmise or a sense of the "reasonable" based on imprecise data) make Petitioner whole for the future: reinstatement with full seniority. Indeed, this would seem under the cited cases to be the preferred remedy, except for situations of impracticality which are not present here.

The object of equity jurisdiction is, of course, not to punish the wrongdoer or compensate his victim. It is to restore the plaintiff to the enjoyment of the rights interfered with to the fullest extent possible. It is to restore the victim as near as may be to the position he would have occupied but for the defendant's wrong.

*Graves* v. *Romney*, 502 F.2d 1062 (C.A. 8, 1974), *cert. den.*, 420 U.S. 963; *Silva* v. *Bell*, 605 F.2d 978, 985 (C.A. 7, 1979). Unlike the law court that attempts, e.g., to make whole with money the individual who has lost a limb through another's negligence or business opportunities through others' unlawful trade combinations, equity jurisdiction molds its decree to the necessities of the particular case. *Hecht Company* v. *Bowles*, 321 US 321 (1944). Because of its flexibility the equity court can arrive at adjustment and reconciliation of competing interests with a nicety unavailable to law courts and money damages.

The UAW internal appeal procedure, as disclosed on this record, cannot afford Petitioner an adequate remedy to enforce his "contractual rights." He was entitled to a trial before the District Court on the question of breach by UAW of its duty fairly to represent him and breach by the employer of its obligation not to discharge him without just cause.

## II

## The UAW Internal Appeal Cannot Provide A Remedy Within The Four Month Period Prescribed In 29 USC §411(a)(4).

§411(a)(4) forbids unions to limit the rights of their members to resort to the courts except that members may be required to exhaust reasonable hearing procedures within the organization which do not exceed a four month lapse of time. This provision is not a grant of power to the unions to restrict their members' right

to sue. It is a limitation upon that power, and whether any exhaustion of internal remedy will be imposed in a given case is discretionary with the trial court. *NLRB* v. *Ind. Union of Marine Shipbuilding Workers*, 391 U.S. 418, 426 (1968). The statute has this effect in suits seeking the vindication of "employee rights" as well as in those based on internal union problems. *Operating Engineers* v. *Burroughs*, 417 F.2d 370, 373 (C.A. 9, 1969), *cert. den.* 397 U.S. 916; *Ross* v. *Int'l Brotherhood of Electrical Workers*, 544 F.2d 1022, 1024 (C.A. 9, 1976); UAW counsel conceded at trial that the statute applied to suits of this kind. (RT 246/2-11.)

The various steps in the UAW appeals procedure and the time constraints, such as they are, have been analyzed in the Statement of the Case, *ante*, pp. 6-7. The local union must decide the appeal within 45 days. The IEB must use its best efforts to dispose of an appeal within 60 days from its receipt by the International President. But the latter appears to have wide discretion to decide an appeal himself and without time constraint. It would seem that the appellate tribunals, short of the PRB or CCAC, would use at least 105 days, and that calculation makes no allowance for the President's taking more than 60 days. Assuming such diligence by the appellant that at each appellate step he uses only five of the 30 days allowed to him to file this appeal, it would take 120 days (4 months) merely to get the appeal to the highest level, i.e., the PRB or the CCAC. Neither of these bodies has any time constraints. The counsel of the PRB has stated that the UAW appeals procedure "is

designed to . . . provide a final adjudication of a claim within a period of approximately nine months to a year."[13]

It was, of course, the powers of the PRB which the trial judge found to be "functionally adequate within the requirements of the instant case" (R 402/28 to R 403/2). It was the appeal to the PRB that he found provided "an objective forum and tribunal" rendering the UAW remedies "as a matter of law, adequate." (R 402/16-21.) On the face of the UAW constitution and by the appraisal of the PRB counsel, the appeals procedure (with its restricted powers) is structured to dispose of matters over a period markedly in excess of four months. It falls far short of the command of §411(a)(4).

Nor should §411(a)(4) be read as requiring Petitioner to pursue his UAW appeals for a period of four months. For the reasons set out in Points I, III, IV and V, these appeals afford a remedy inadequate as a matter of law. To have required Petitioner to occupy four months in such pursuits would be to require resort to an idle act. Equity does not "require a useless thing nor insist upon an idle formality". *Stewart* v. *United States*, 327 F.2d 201, 203 (C.A. 10, 1964); *Munchak Corp.* v. *Cunningham*, 457 F.2d 721, 725 (C.A. 4, 1972).

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[13] David Y. Klein, Esq., "Enforcement of *The Right to Fair Representation: Alternative Forums*," in the *Duty of Fair Representation*, Jean T. McKelvey, ed., Cornell University, 1977, pp. 98, 112.

## III

**The UAW Appeal Is Inadequate Because Its Tribunals Lack Jurisdiction Over The Subject Matter And An Essential Party. To Require Petitioner To Pursue That Appeal Would Produce No Result Helpful To The Trial Court And Would Impose Duplicative Litigation Burdens Upon Petitioner.**

**(a) The UAW appeal is inadequate because its tribunals lack jurisdiction over the subject matter.**

A claim that an employee's discharge violates a collective agreement and that his union has breached its duty of fair representation in connection therewith is an action "arising under §301 . . . and is controlled by federal law." *Humphrey* v. *Moore*, 375 US 335, 343-344 (1964),. The application of that principle was spelled out more fully in *Vaca* v. *Sipes, supra*, where the Court held that the employee's claim of violation of the collective agreement is a "§301 suit" which is maintainable "provided the employee can prove that his bargaining agent has breached its duty of fair representation in its handling of the employee's grievance." (386 US at 186.) Proof of the latter, it was held, is "part and parcel of his §301 claim." (Idem.) In these lights it is incontestably true that, the action being "controlled by federal law" (*Humphrey* v. *Moore, supra*), the courts are the "primary guardians of the duty of fair representation," in the language of the Second Circuit adopted by this Court in *Czosek* v. *O'Mara*, 397 US 25,27 (1970.) In

that case both courts exercised their guardianship by a liberal reading of the pleadings so as to reserve to the judicial arena the trial of the fair representation issue. Here the Court is asked to wield the judicial guardianship in order to save for the courts, in this §301 lawsuit, the interpretation and application of the duty of fair representation. In this, the Court is being asked to fulfill the judicial responsibility first defined in *Textile Workers* v. *Lincoln Mills*, 353 US 448 (1957). From that day forward the declaration and application of law under §301 has been a process entrusted to the courts, purposed to develop a federal law that effectuates national labor policy and uniformity. This subject matter cannot be entrusted to union tribunals except by abdication of the responsibilities imposed by *Lincoln Mills, supra*.

Moreover, the UAW tribunals other than the PRB are singularly unqualified to adjudicate this important question of §301 law. Petitioner would have appealed to the "delegate body" of his amalgamated local union and thence to the International President and the IEB. (Joint Ex.B, Art. 33, §3, 5, 6, 7; A 70 to A 73.) The CCAC is selected from among convention delegates from each of the UAW's geographic regions. (Joint Ex.B, Art. 33, §8; A 74.) Whether or not participation of such individuals places the union in the position of sitting as judge in its own case (cf *In re Murchison*, 394 US 133, 136 (1955)), the potential for adjudication of important federal rights predicated upon collateral and irrelevant considerations cannot be disregarded. (*See*

*Fox and Sonenthal*, "§301 And Exhaustion of Intra Union Appeals; A Misbegotten Marriage" 128 Univ. of Pa. Law R. 989, 1005-1007.) Given the concern this court has already expressed for the protection of the rights of individual workers in a collective bargaining process controlled only by his union and his employer (*Vaca* v. *Sipes*, 386 US at 182; *Hines* v. *Anchor Motor Freight, Inc.*, 424 US at 564-565) the UAW tribunals offer a slim and uncertain reed.

**(b) The UAW appeal is inadequate because its tribunals lack jurisdiction over the employer as a party.**

Since, under *Vaca*, the employee must prove his union's breach of duty of fair representation as a precondition to proceeding against the employer in order to vindicate his "contractual rights" (386 U.S. at 186), the question whether the union has failed in this respect is a most important ground of defense for the employer. Indeed, the employer is required to litigate the issue alone in those actions where the employee has chosen to sue only the employer. See, e.g., *Vaca* v. *Sipes*, 386 U.S. at 186-187; *DeArroyo*, 425 F.2d at 286-287.

The UAW appeals procedures make no provision for the participation therein of the employer as a party. There is no basis in law whereby the UAW tribunals could subject the employer to their jurisdiction in an appeal pertaining to fair representation. Thus, in the absence of the employer's agreement to accept the union tribunal's determination on this issue such a decision

would have no effect at all. It could be neither a final decision on the question, nor helpful to the court because in the absence of the employer the issue would have been neither fully nor fairly litigated.

Moreover, the employee would be prejudiced by the absence of the employer as a party. The question of the union's fairness in representing the employee may well have involved conduct in which the employer was a participant or an observer. Unless he can compel testimony or documents from the employer, the employee would most likely be deprived of access to that information.

**(c) Exhaustion of the UAW appeal should not be made mandatory on grounds that such procedures would produce results helpful to the trial court.**

A principal ground for the decision below is the notion that "administrative filtration" would sharpen the issues and assist judges "faced with unfamiliar rules and practices". (623 F.2d at 566-567, n.3) Apart from the inability of the UAW tribunals to have all parties before them, there is nothing in the record which affords information as to whether at any statge of the UAW procedure[14] there would be a factual analysis or application of internal "rules and practices" which could be of guidance to the court. Nor can it be ascertained from

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[14] Other than a PRB decision which cannot eventuate within the time prescribed by §411(a)(4).

the evidence in this case what would be the nature of the record underlying such a determination, for there is no information as to how, in the UAW appeal process, the issues are framed, the facts adduced, or the record made.

Moreover, the need for "administrative filtration" is overstated. To the extent that the court may be faced with "unfamiliar rules and practices", union counsel and union officers, as well as the employee's lawyer and his witnesses, are perfectly capable of marshalling and presenting the facts, developing any needed expertise, interpreting union rules, refining the issues for the benefit of the trial judge. Discovery is available to both sides of the judicial proceeding in order to bring out all essential facts in advance of trial. These processes in an adversary proceeding are our traditional way of disposing of such problems. There is nothing here which would be strange to judicial experience. Issues such as bad faith, discrimination and perfunctoriness are familiar grist in all judicial mills. One trial of the claimed breach of the duty of fair representation, and that before the court, is all that is needed to an informed adjudication of it. Two trials are not only unnecessary, they might well produce conflicting results. It is certain that they will contribute heavily to the exhaustion of the worker about which this court warned in *Marine Shipbuilders*, 391 U.S. at 425.

The determination of the UAW tribunals would lead to duplicative litigation of the fair representation issue. Since there are involved questions of federal labor law to be determined and applied by the courts so as to

effectuate a uniform national labor policy, the trial court could not be bound by the union's adjudication of its own conduct. The court's alternative would seem to be to litigate the issue *de novo* or to determine whether the union tribunal proceeding was fair and its determination in conformity with the standards of the federal labor law developed by the courts. Either course involves searching factual inquiry, and the likelihood of judicial economy is extremely remote. The consequences of such a course would be that the aggrieved employee, relying on his limited resources, would be compelled to litigate the fair representation issue twice. Such an onerous burden would seem as unnecessary as it is excessive.

## IV

## The UAW Internal Appeal Is Inadequate By Reason Of Its Incompetence To Afford Any Remedy To Petitioner.

The court below found the UAW appeals procedure "adequate" as respects the union because in awarding money it could give Petitioner "no different relief" from that which the courts can give. (623 F.2d at 566.) In this, the Court of Appeals wholly misconceived the nature of this action. Petitioner sues the UAW to establish facts necessary to vindicate his "contractual rights" against ITT. He does not seek, nor can the courts give him, damages for the union's failure to represent him fairly, considered alone and without

reference to the employeer's breach of the collective agreement. That failure is established only as a precondition to pursuing his remedies under the collective agreement. (*Vaca* v. *Sipes*, 386 US at 186.) Initially his "remedy" upon Proving breach of the duty of fair representation is only his right to pursue his action against ITT. Whether the union is answerable to Petitioner in money damages must await a court determination of the contract violation question. But the union's answerability in this respect is only for an apportionment of the loss stemming from the employer's breach of the collective agreement consisting of "increases" attributable to the union's breach of duty. *Vaca* v. *Sipes*, 386 US at 197-198. Plainly, if the employer has not breached the collective agreement, the union's failure has caused no damage.

There would seem to be nothing in this Court's approval, in *Czosek* of a separate action by the employee against the union which makes against the foregoing. The facts in *Czosek* are materially different. The claim against the employer was dismissed for failure to exhaust remedies under the Railway Labor Act, and that aspect of the case was not before this Court. (397 US at 27, 29-30.) This Court decided only that the employer's dismissal from the action did not deprive the employee of his action against his union for failure to represent him fairly. Since there had been no decision on the merits of the employee's claim against the employer, that issue was still to be decided, judicially. Nor was it decided that the employee could recover against the

union in the absence of a showing that the latter's failure pertained to a meritorious claim by the employee against the employer. The Court expressly reserved decision on whether on a case like the present one "the employer may always be sued with the union". (397 US at 29-30.) In *Vaca*, the Court observed that the employee's claims against the employer and the union "probably should" be joined. (386 US at 197.) Finally, in *Czosek* the Court was not confronted with questions raised here concerning the relationship, if any, between the employee's remedies agaisnt the employer and the union, both judicial and intraunion.

The union tribunal is plainly without jurisdiction to decide the issues pertaining to the breach of the collective agreement by ITT. No law confers such a power upon the UAW appeals procedure, and it has otherwise no jurisdiction over ITT. The UAW tribunals cannot compel the appearnace and participation of ITT. They do not have the power to summon witnesses or secure the production of documents. Clearly under *Vaca*, the issues of the employee's "contractual rights" against the employer are for the court to determine as is the remedy. (386 US at 195-198.) Assuming that the employee proves breach of both the union's duty fairly to represent him and the employer's obligations under the collective agreement, the remedy is to be fashioned by the Court on the basis outlined above. (Idem.) It is only at this point in the case that "money damages" (623 F.2d at 566) could arise. But until that time the responsibility of the union in damages to Petitioner will

not have arisen, and there would be nothing for the union tribunal to decide or award in that connection.

When the question of Petitioner's remedy shall have arisen, however, it is for the court to determine the nature of the remedy and its allocation as between ITT and UAW. At that stage, to call upon the union tribunal to fashion any part of the remedy against the union would be both an abdication of judicial responsibility and the creation of inexcusable circuity of action.[15]

## V

**The Court Of Appeals Erred In Making Exhaustion Of The UAW Appeal Procedure Mandatory In Order To "Forestall Unnecessary Interference With Union Affairs".**

The subject of Petitioner's action here is his employment relationship with ITT: his discharge and his claim for reinstatement with back pay. Other than claiming that UAW did not represent him fairly in his

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[15] There may be situations in which, because of dissolution or bankruptcy or the like, the employer could no longer be able to reinstate the employee or to respond in damages so that the only relief available to the employee would be money damages. Under the comparative fault doctrine of *Vaca*, this might result in the union's bearing the full monetary responsibility for the vindication of the employee's "contractual rights". But it would not expand the union tribunal's competence to decide that the contractual violation had occurred or to fix the damages. Those would continue

discharge grievance, Petitioner makes no claim concerning his internal relationship within the UAW. In these circumstances, exhaustion of the internal union remedy should not be required.

It has been persuasively reasoned in *Brady* (401 F.2d at 102), that the exhaustion of internal union remedies doctrine applies only to "wholly internal union matters" and not to a dispute which "focuses on the employment relationship". This, plus the fact that the employee is seeking reinstatement, which is a remedy unavailable to him within the internal union procedures, was held to relieve the employee from exhausting the union remedy before filing his lawsuit.[16] This reasoning

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to be matters for the court. A similar result would probably occur in the remand of *Czosek* if no claim were made against the employer laying a basis for relief against it. But these questions are not reached in this proceeding.

[16] *Brady* is miscited in the opinion below. (623 F.2d at 566). At the portion of the opinion there referred to, the *Brady* court carefully distinguished between that part of the employee's claim alleging "different treatment" by the union in its internal relations with him (i.e. his "union-member" relationship) from that part of his claim involving his "employer-employee relationship". It was as to the former that the *Brady* court held exhaustion of the internal union remedy mandatory because it "forestalls judicial interference with the internal affairs of a labor organization . . ." (401 F.2d at 104.) Earlier on the same page, the *Brady* court repeated what had been said elsewhere in the opinion (401 F.2d at 102) that because one of the employee's claims "involved the propriety of the discharge, and thus the employment relationship, Brady was not required to exhaust his internal union remedies". as to it (401 F.2d at 104).

commends itself for adoption as national policy. In the "employment relationship" where the aggrieved employee seeks to vindicate contractual rights beyond the power of the union alone to enforce, the doctrine of exhaustion of union internal remedies should not be applied.

Closely akin to *Brady* are cases which deal with employee rights that stem from statutory or constitutional command. In *NLRB* v. *Industrial Union of Marine Shipbuilders*, 391 U.S. 418, 428 (1968), this Court held that a member's failure to resort to internal union appeals before suing his union officer could not be a basis for discipline. There the employee was regarded as exercising rights in the "public domain" designed to effectuate important public policy in the federal labor law. This doctrine was applied in *Bise* v. *International Brotherhood of Electrical Workers*, 618 F.2d 1299 (C.A. 9, 1979) where employees who had worked during a strike sued to nullify the union's discipline. The union's internal procedures were held an inadequate remedy because "the plaintiffs have raised issues that are in the public domain" (618 F.2d at 1303-1304.)

The "employment relationship" matters in *Brady* and here also involve matters in the public domain intimately connected with the effectuation of public policy. The employee's right to fair representation has been declared by statute under the Railway Labor Act 45 U.S.C. §152, Fourth, Eleventh, *Steele* v. *Louisville & Nashville Railroad*, 323 US 192 (1944), *Conley* v. *Gibson* 355 US 41 (1957) and under the National Labor

Relations Act 29 U.S.C. §159(a); *Vaca* v. *Sipes, supra, Humphrey* v. *Moore* 375 US 335 (1964). The latter cases fashioned the remedy under §301 precisely for the vindication of that public right. The employee rights involved in the instant case and *Brady, supra*, reach deep into the fabric of the national policy to promote industrial peace and the improvement of wages and working conditions through collective bargaining. Moreover, to the extent that the action against the employer over the wrongful discharge gives the employee a hearing which in a sense substitutes for the arbitration hearing of which he was wrongfully deprived, the case involves also the vindication of the national policy to promote and encourage arbitration in the advancement of industrial democracy and the peaceable resolution of industrial disputes. See *Steel Workers Trilogy Cases*, 363 US 564, 574, 593. (1960).

## CONCLUSION

For the reasons set out above, the following disposition should be made with reference to Petitioner Clayton's cause:

(a) The judgment in favor of the UAW respondents and against Clayton should be reversed.

(b) The judgment in favor of Petitioner Clayton and against Respondent ITT, should be affirmed.

(c) The entire case should be remanded to the District Court for trial of Petitioner Clayton's claims that the UAW Respondents breached their duty fairly to represent him and Respondent ITT violated his contractual rights by discharging him without just cause.

Respectfully submitted,

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